CARLE et al. *v.* CORHAN et al.

June 10, 1920.

[103 S. E. 699.]

1. **Equity (§ 340*)—Allegations of Sworn Answer Responsive to Prayer for Discovery Held Evidence against Complainant.**—In an equity action, answer of a defendant in response to complainant's special prayer for discovery, where answer was sworn to by the defendant's president, and contained allegations as to facts within the president's knowledge, held evidence against complainant.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 669.]

2. **Equity (§ 344*)—Answer of Corporation Held Evidence in Favor of Incorporators, Joined as Defendants.**—Though generally the separate answer of one defendant cannot be used as evidence for a codefendant, such rule was not applicable where answer of corporation was in response to special prayer for discovery, calling for an answer which, if adverse to complainant, necessarily established as a fact the defense upon which the other defendants, who as incorporators were sought to be held personally liable on the corporation's debt, relied.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 671 et seq.]

3. **Corporations (§ 30 (5)*)—Incorporators, Purchasing Theater for Corporation, Held Not Personally Liable.**—Incorporators, purchasing theater for corporation while it was in the process of formation, and only a few days prior to completion of incorporation, from sellers, who understood the purchase was by the corporation, could not be held personally liable because they executed purchase-money notes and deed of trust in the name of the "American Theater Co., Inc.," instead of the "American Theater, Inc.," the correct name of the corporation.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 578.]

4. **Appeal and Error (§ 266 (1)*)—Excuse for Failure to Except to Commissioner's Finding, Not Presented in Lower Court, Not Considered on Appeal.**—Excuse for failure to file exceptions to finding of commissioner, not presented in lower court, cannot be considered on appeal.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 565.]

5. **Appeal and Error (§ 266 (1)*)—Commissioner's Error in Making Finding Held Reviewable, Notwithstanding Failure to Except to Finding in Lower Court.**—In action to hold incorporators personally liable on corporation's notes, errors of commissioner in finding incorporators personally liable are reviewable on appeal,

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

though the finding was not excepted to in lower court, since the question, being one of law for determination by the court, was improperly referred to the commissioner, and since the error in holding incorporators liable was fundamental error, apparent from the face of the report and from the pleadings and exhibits.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 565, 566.]

**6. Corporations (§ 30 (5)*)—Liability of Incorporators on Corporation Debt, on Theory That Name Was Misstated, Was for Court, and Not Commissioner.**—In action to hold incorporators personally liable on notes executed during formation of corporation in the corporate name, on the ground that the name was misstated, the question of the incorporators' liability is one of law for the court, and was not a question to be submitted to a commissioner.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 578.]

**7. Corporations (§ 30 (5)*)—When Rule as to Promoters' Personal Liability for Debts Applies.**—Generally persons dealing with promoters of a corporation to be thereafter formed are allowed the double security of the promoters and the corporation when it comes into being; but where the contract was made solely on behalf of, and the credit was extended solely to, a corporation in the process of formation, and which shortly thereafter procured its charter, the rule does not apply.

**8. Appeal and Error (§ 1107*)—Equity Action Remanded, with Leave to Transfer to Law Side.**—In equity action by complainant, whose cause of action is at law, appellate court, in reversing decree, will remand the case, with leave to complainants to transfer the cause to the law side of the court, under Code 1919, § 6084, though case was disposed of in lower court before latter statute became effective.

Appeal from Corporation Court of Hopewell.

Suit by K. C. Corham and another against F. Carle, Will Monjot and the American Theatre, Inc. Decree for plaintiffs, and defendants appeal. Reversed and dismissed as to first named defendants, and remanded, with instructions as to last-named defendant.

*W. L. Devancy, Jr.,* and *J. K. McCotter,* both of Hopewell, and *Willis C. Pulliam,* of Richmond, for appellants.

*Wm. McK. Woodhouse,* of Norfolk, for appellees.

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